No. 191. Of October Term, 1901.

No. 191.

Supreme Court of the United States.
FILED
MAR 6 1902
JAMES H. McKENNEY,
Clerk

Brf. of Johnson for Appellee.

IN THE

Filed March 6, 1902.

IN EQUITY.

Brainard H. Warner and Louis D. Wine, Appellants,

vs.

Lily Alys Godfrey, Appellee.

[Record No. 17,965.]

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

JOHN G. JOHNSON,
For Appellee.

IN THE SUPREME COURT OF THE UNITED STATES.

IN EQUITY.

Brainard H. Warner and Louis D. Wine, Appellants,

vs.

Lily Alys Godfrey, Appellee.

October Term, 1901.

No. 191.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

On the twenty-sixth day of March, 1896, Mary Alys Godfrey, mother of the appellee, who held in trust for the latter the legal title to lots 1, 2, 3 and 66 in square 134, and lot 40 in square 92 in the city of Washington, conveyed the same, subject to loans amounting to about $17,500, to one Stephen A. Dutton, for an expressed consideration of $65,000. This consideration was paid by a conveyance by Dutton of a certain wharf property in the city of New York. No title to the property thus conveyed was vested in Dutton, and the conveyance to him, obtained by his fraudulent representations concerning it, was a fraud upon the appellee.

Dutton employed a Mrs. Mussey, a practicing attorney in Washington, to sell for him the four lots in square 134.

On the tenth day of April, 1896, in pursuance of this employment, she called upon Mr. B. H. Warner, of the firm of B. H. Warner & Co., real estate agents in Washington, and asked Mr. Warner, whom she saw, to sell the property, stating that the owner would take $25,000 for the same. This offer was so tempting, that within a few hours, on the same day, two members of the firm, Warner and Wine, agreed amongst themselves to purchase the property for their own account. They prepared, on that day, and sent to Mrs. Mussey, a contract of sale to one L. W. Richardson, a young man, who was related to Wine, it having been understood, with Mrs. Mussey, that a commission of three per cent. would be paid, which would be divided, in the proportion of one-third to her, and two-thirds to B. H. Warner & Co.

This contract was executed by Dutton and by Richardson. The matter was so hurried, that the conveyance, by Dutton, was delivered, and settlement was made, on the thirteenth day of April, 1896. The amount due to Dutton, less the commission of three per cent., which was divided in the proportions agreed upon, was paid. The deed to Richardson was at once entered of record.

On the seventeenth day of April, 1896, B. H. Warner & Co. wrote to Mrs. Godfrey stating that a client of theirs had recently purchased the premises in question and asked her for the keys. These were sent, on the eighteenth day of April, 1896.

In July, 1896, or thereabouts, the appellee ascertained the fraud which had been practiced upon her by Dutton, in connection with the property which had been conveyed to her. Thereupon Dutton was indicted for the crime he had committed, and, in due course, he was convicted and sentenced.

In September, 1896, with no other knowledge than that Dutton had perpetrated a gross fraud upon her, and that the title to the lots in square 134 had been conveyed to Louis W. Richardson, a bill in equity was filed in the Su-

preme Court of the District of Columbia, by the appellee, against Dutton, his wife and Louis W. Richardson. This bill averred the facts which had occurred, as they were then understood, and the belief of the plaintiff that Richardson had parted with no valuable consideration for the lots conveyed to him. It prayed a decree of reconveyance.

Default was made by Dutton. It was thereupon ordered that lot 40 in square 92 should be reconveyed to the appellee.

Richardson, however, filed an answer to the bill, in which he averred he had purchased the premises in question, through B. H. Warner & Co., real estate brokers, after the same had been offered to said firm for sale at $25,000.

Simultaneously with the deed to him, Richardson executed a declaration, which was not recorded, that he held the premises in trust for Warner and Wine, who had paid the whole consideration money, upwards of about $7500.

In May, 1897, the amended bill was filed, in which it was averred that Richardson was only a nominal party to the transaction, and that the real parties were Dutton on the one part and Warner and Wine on the other.

On the seventeenth day of July, 1897, a more formal amended and supplemental bill was filed, in which the facts as they had then become known to the complainant, were stated more specifically.

In his earlier answers, Richardson claimed to have purchased the property upon his own account. In the course of the later proceedings, Warner and Wine admitted the property had been purchased in his name, for their benefit.

An immense body of testimony was taken as to the real value of the property and as to the circumstances of suspicion connected with the transaction, known to Warner and Wine, charging them with notice that a fraud of some kind, had been perpetrated.

Some of the expert witnesses testified that the property which was sold for $25,000, was worth upwards of $50,000. Other witnesses called for the defendant swore it was not worth much beyond $30,000 or $35,000.

The case was tried in the Supreme Court of the District

of Columbia, and a decree was entered dismissing the bill. An opinion was delivered by Associate Justice Hagner, elaborate and able, in which he found that the value paid by Warner and Wine was not grossly insufficient, and that they had no knowledge of circumstances of fraud or of suspicion, such as deprived them of the protection of *bona fide* holders for value without notice. It did appear, however, that the firm of B. H. Warner & Co., until within a very few months prior to the conveyance to Dutton, had had the premises in their hands as real estate agents for sale at the price of $55,000.

The case was appealed to the Court of Appeals of the District of Columbia. The opinion was there delivered by Mr. Justice Shepard, substantially affirming the findings of fact in the lower court, but holding Warner and Wine guilty of constructive fraud in having purchased from Dutton, for their own account, property they had professed to sell, acting as his agents, for an agreed-upon compensation, to a third person. The Court of Appeals held that inasmuch as Dutton, by reason of the fraud he had perpetrated, held the title as trustee for the appellee, the purchase for their own account of what they sold as his agents, was defeasible by the appellee, the owner of the equitable title. In other words, the Court of Appeals held that the appellee, the owner of an equitable title held by Dutton as a fraudulent trustee, was entitled to avoid a purchase of the title made by his agents in the name of a third person, but in fact upon their own account and for their own benefit.

The Court of Appeals allowed an amendment to be filed, which claimed, on behalf of the appellee, the right to avoid the title of the agents who had acted fraudulently. This amendment was filed. Warner and Wine made answer thereto. The case was referred to an Auditor to find the amount of outlays which had been made by Warner and Wine, in and about the purchase of the property. The Auditor (Record, page 587) reported the amount of such outlays with interest to be $10,455.28.

It was thereupon decreed, exceptions to the Auditor's

report having been dismissed, that Warner and Wine should convey to the appellee the four lots in question, upon payment of said sum of $10,455.28. From this decree Warner and Wine appealed to this court. Having as yet been favored with no brief filed by their counsel, it is necessary to deal with the question by way of anticipation of what may be said.

ARGUMENT.

We will discuss what suggests itself to us in this case under four propositions:—

I. WARNER AND WINE, ACTING AS AGENTS FOR THE SALE OF DUTTON'S PROPERTY, PURCHASED THE SAME WITHOUT THE KNOWLEDGE OF DUTTON FOR THEIR OWN BENEFIT, IN THE NAME OF RICHARDSON, WHOM THEY REPRESENTED TO BE THE REAL PURCHASER.

II. THE PURCHASE BY THE AGENTS FOR THE SALE, WARNER AND WINE, IN THE NAME OF A THIRD PERSON FOR THEIR OWN BENEFIT, WAS A FRAUD UPON DUTTON, SUCH AS ENTITLED HIM TO A RECONVEYANCE UPON REIMBURSEMENT OF THE AGENTS' EXPENSES.

III. THE APPELLEE, AS EQUITABLE OWNER OF THE PROPERTY WHICH STOOD IN THE NAME OF DUTTON, WAS CLOTHED WITH THE RIGHT TO DEMAND A RECONVEYANCE OF THE PREMISES SECRETLY PURCHASED BY THE SELLING AGENTS IN THE NAME OF A THIRD PERSON FOR THEIR OWN BENEFIT.

IV. NOTHING APPEARED IN THE PROCEEDINGS WHICH BARRED THE RIGHT TO A DECREE SUCH AS WAS ULTIMATELY ENTERED.

I. Warner and Wine, acting as agents for the sale of Dutton's property, purchased the same without the knowledge of Dutton for their own benefit in the name of Richardson, whom they represented to be the real purchaser.

The agreement between Dutton and Richardson, dated 10th April, 1896, (Record, page 19), conclusively establishes the relations of the parties. The name of Dutton was not filled in the body thereof, as the party of the first part; but Mrs. Mussey sent the contract to him for execution and by him it was executed. The contract is between Dutton and Richardson, the former agreeing, in consideration of the sum of $500 paid to B. H. Warner & Co., "agents of the parties of the first part," as a deposit, to convey the lots in question for $7500 in cash, subject to the encumbrances.

The real purchasers were two members of the agents' firm—Warner and Wine. A third member, Rheem, witnessed the signature of Richardson.

Not only did the firm of B. H. Warner & Co. appear as agents of Dutton in the contract, but they were actually paid two-thirds of the commission allowed to the agents for making the sale.

Mrs. Mussey was called by the appellants as a witness. Her testimony is to be found in the Record, pages 379, 400 and 430. She testified (Record, page 380) that she had been authorized by Dutton to raise money upon the property, and swore further:—

> "I finally, as there was haste required, went to the "office of Messrs. Warner and Wine, knowing them "to be large dealers who usually had clients with "money to invest in promising real estate. I met "in that office Mr. Wine and, I believe, Mr. Warner, "but my business that morning was done entirely "with Mr. Wine. I stated to him that I had a client "who was forced to sell his property to raise money, "and that if no better could be done I would dis- "pose of it for him; I thought at least he would dis- "pose of it for the net sum of $25,000. I asked "Mr. Wine if, in his opinion, a larger sum could "be raised on it within a day or so. He said he did "not think it could. He then looked at the property "on the map, I pointing out those four lots to him. "I returned to my office, and I think it was in the

"evening of the same day that Mr. Wine came to me "with a contract or option for the sale of that prop- "erty at $25,000, reciting a deposit of $500 and giv- "ing fifteen days to complete the sale. I told him "that we would not sell the property on that length "of time; that it would be either sold in three or "four days at that price or not at all, and he changed "it to five days, as I remember, and left the paper "with me for the signature of Mr. Dutton. Mr. "Dutton came to my office that same evening, and, "after a conversation with him, he signed the paper "for the sale of the property, and I delivered it to "Mr. Wine. The next day I went to Mr. Warner "and Mr. Wine to see when they would complete "the purchase, as it had been understood they would "do that on Saturday. Mr. Warner said, 'I see that " 'that property had been conveyed on the record " 'to Mr. Dutton.' I said, 'Yes; he is my client, and " 'that is the person from whom you will purchase " 'the property, and I want to close it up to-day.' "Mr. Warner said they could not do it for a few days. "I said then we would not do it at all, for it would "be a sale now or not at all; that he must have the "money. I went back and had a conversation with "Mr. Czaki, stating to him that it was understood "that I would have some money for him on Mon- "day. On Monday Mr. Dutton and his wife ap- "peared in my office; also Mr. Czaki. Mr. Dutton "and Mrs. Dutton and myself went to the office of "the Columbia Title Company, and there the papers "were executed for the sale of the property. Mr. "Wine was introduced by me to my client Dut- "ton, and his wife, and after a brief consultation "he returned and Mr. Edmondson completed the "transaction. In the afternoon the deed was de- "livered to Mr. Edmondson, and Mr. Edmondson "made out a statement and delivered the checks "for the net amount of the sale, after the deduction "of accrued interest and taxes, to Mr. Dutton. Mr.

"Dutton indorsed those checks and handed two of "them to me, one for $300 and something for my "bill and expenses, and one for $250, my share of "the commissions for the sale of the property. He "handed one of those checks for $500 for the com-"mission of Messrs. Warner and Wine to Mr. Ed-"mondson, and the other checks he took over to the "Columbia National Bank, on which they were "drawn, and there I identified him as Stephen A. "Dutton, and he received the cash for them. I re-"turned to my office after having deposited my "checks in the Second National Bank and met Mr. "Dutton as he was going down the stairs, and he "stated to me that he would leave for New York on "the next train. That is the last time I saw Mr. "Dutton."

It thus appears that no statement was made to Dutton, other than that which appeared upon the face of the contract, viz., that B. H. Warner & Co. were his agents, and that the purchase was by a third person, Richardson. The payment of B. H. Warner & Co.'s share of the commission, viz., $500, by a check to their order, established beyond doubt their relation as agents.

Mrs. Mussey (Record, page 431) further testified:—

"Q. Had Mr. Wine told you, at your interview "with him on the morning of 10th of April, 1896, "that he would bring you around this contract of "sale? A. He did not. Q. Had an oral agreement "been made in the morning for the sale of that prop-"erty when you saw Mr. Warner and Mr. Wine, or "was this instrument your first knowledge that your "proposition was accepted? A. That was the first "knowledge I had of it. Q. And that was within a "few hours after you had held your first interview "with Mr. Warner and Mr. Wine at their office? A. "My interview was with them in the morning, and "this was in the afternoon. Q. Did you consider "that a pretty quick sale for a dull market? A. I

"did. * * * Q. I will read you the following "questions propounded to Mr. Wine in the bill of "discovery here and his answer thereto, and ask you "whether he is correct or not in his statement, ac- "cording to your recollection of the fact: 'Did you "disclose to Mrs. Mussey at the time of said trans- "action, to wit, in April, 1896, that Louis Wine "Richardson was merely a dummy, and that you and "your partners were the real purchasers? A. I said "nothing to Mrs. Mussey upon the subject of Louis "Wine Richardson's connection with the matter.' "A. I think that is correct. Q. When did you "first learn that Mr. Richardson was only a dummy, "in whose name the title was taken? A. It was "several months after that. Q. Can you state more "definitely exactly the time when you first learned "that Mr. Richardson was a dummy in that trans- "action and not the real purchaser of the property? "A. It was some time, I think, in the following Fall "or Autumn, but when I do not remember."

On the 17th of April, 1896 (Record, page 14), B. H. Warner & Co. wrote to Mrs. Godfrey, saying:—

"A client of ours has recently purchased premises "known as 1801 Q. Street, N. W., this City from "Mr. Dutton."

Wine (Record, page 444), thus testified:—

"A. About half-past ten o'clock on the morning "of the 10th of April, 1896, Mrs. Ellen S. Mussey "came in our place and offered for sale lots 1, 2, 3 "and 66 of square 134 for the sum of $25,000, agree- "ing if the sale were made that a commission of "three per cent would be allowed, one-third of which "she would want for herself. She also stated that "$7500 cash would be required and an assumption "of $17,500 trust. I took the matter under consid- "eration until about two o'clock in the day trying "to think of some one who might be a possible pur-

"chaser for the property. I could not think of any "one, and about that time in the day I determined "to buy the property myself. In the meantime I "had talked with Mr. Swartzell and Mr. Warner "about it, and Mr. Swartzell had promised to go in "partnership with me to buy it in the event Mr. "Warner did not. I had not talked with him about "it until that time. At two o'clock my nephew, "Louis Wine Richardson, was in the office, and I "drew up a contract for the purchase of the property, "which I believe is on file here, acknowledging re- "ceipt of $500 from Mr. Richardson as a deposit on "this property, setting forth in the contract how it "was to be settled. Louis Richardson signed this "contract, which was witnessed by Mr. C. B. Rheem. "I either took or sent that contract to Mrs. Mussey; "I do not remember which now. At any rate I left "it with her. About four o'clock in the afternoon "Mrs. Mussey sent the contract back to me just "as I had made it out, with one exception; that ex- "ception was that the fifteen days allowed for settle- "ment had been erased and five days inserted."

Warner testified (Record, page 529):—

"Q. Now, please tell us the whole of your connec- "tion with the purchase of the property which is in- "volved in this suit, located at Q Street and New "Hampshire Avenue. A. Mrs. Mussey came to the "office of B. H. Warner & Co., I think, on the morn- "ing of April 10th, 1896. I was busy and with some "one in my back office, and I turned her over to Mr. "Wine. A few moments afterwards he told me she "had offered the property involved in this contro- "versy for sale, and asked me to look at the lots on "the plat book, which I did. He told me she would "take $25,000 for the property, less a commission "of three per cent."

We submit that the fact of an employment of B. H. Warner & Co. as agents to sell, of the payment to them

of a commission for their services as such, of a secret purchase by them for their own benefit in the name of an ostensible third person is conclusively established by the record. This being so, we have an ordinary case of an abuse of trust by an agent, who deceives his principal into the belief he has sold to another person, at a time when he has actually bought for himself.

II. The purchase by the agents for the sale, Warner and Wine, in the name of a third person for their own benefit, was a fraud upon Dutton such as entitled him to a reconveyance upon reimbursement of the agent's expenses.

The proposition which we have stated is so elementary that it would be an insult to attempt to elaborate the same.

No agent can take advantage of his agency to secure for himself a secret benefit. Were it permitted to real estate agents to purchase for themselves, the property intrusted to their care to sell, there would be an end of any ability on the part of the owners to secure fair dealing. It is immaterial that the price, $25,000, named by Mrs. Mussey, was paid. A vender may be willing to sell for a certain sum in the belief that his agents have sold to a third person, but be unwilling to sell if advised of the fact that they are buying for themselves.

III. The appellee, as equitable owner of the property which stood in the name of Dutton, was clothed with the right to demand a reconveyance of the premises secretly purchased by the selling agents in the name of a third person for their own benefit.

The appellee was deprived of her property by a fraud. The conveyance to Dutton, resulting from his fraud, was one which vested in him the legal title as a trustee *ex maleficio* of the grantor.

If A., holding title as trustee of B., is defrauded by an agent in whose hands he places the property for sale, there can be no doubt as to his duty to avoid the transaction, if

such avoidance be for the benefit of the *cestuis que trustent*. Should the trustee fail to perform his duty, a court of equity would compel such performance, for the benefit of the *cestuis que trustent*.

Apart from this elementary principle, the *cestuis que trustent* would be entitled to a reconveyance because of the fact of the agent who had acted fraudulently being not entitled to the protection accorded to a *bona fide* purchaser.

The appellee was entitled to a decree of reconveyance by reason of Dutton's fraud, unless Warner and Wine held the title under such circumstances as gave to them, in equity, the better right.

Upon examination, it was ascertained they held a defeasible title, subject to revocation upon the return to them of the outlays they had made.

How could they assert this defeasible title against the equity of the appellee?

IV. Nothing appeared in the proceedings which barred the right to a decree such as was ultimately entered.

The appellants claimed that at one stage of the proceedings they had expressed a willingness to reconvey to the appellee, upon reimbursement of their outlays. It does not appear what amount they claimed to have expended, and in view of the fact that in the proceedings before the Auditor in the Court of Appeals they claimed a much larger amount than was allowed, it is probable there would have been no agreement as to the actual amount to which they were entitled.

This willingness, however, was not put into the shape of any actual tender. It was made at a time when the appellee was ignorant of many of the important facts. The conveyance had been made to Warner and Wine in such haste and under such circumstances as properly grounded a suspicion of bad faith.

We submit that a person ignorant of important facts,

and justly suspicious as to what has occurred, is not prevented from insisting upon a conveyance to her upon terms of reimbursement of the expenditures of those who hold a title in which she is interested, because she had not acted instantly upon an expression of willingness to convey.

It has also been suggested by the appellants that the Court of Appeals had no right to rest a decree upon a point of law which had not been previously made. There is no merit in this suggestion. The appellee was claiming she had been defrauded of her property by Dutton and that she was entitled to a reconveyance. In the course of the proceedings the whole transaction was developed. It was quite within the power of the court, upon the facts disclosed, to decree the reconveyance demanded, upon any equitable ground developed. It is not for the appellants to complain that in the decree entered they were allowed reimbursement for their expenses.

JOHN G. JOHNSON,
For Appellee.